

## Environmental law

### Everything That You Wanted to Know But Were Afraid to Ask

Public participation during the site remediation process

By Edward F. McTiernan

Over the past several years there has been a growing emphasis on community notice and involvement in routine environmental clean-up projects in New Jersey. The New Jersey Department of Environmental Protection (“DEP”) has issued a number of informal guidance documents designed to encourage responsible parties to engage in proactive public outreach. Even the Legislature has taken action to require DEP to publish notice prior to issuing No Further Action letters or settlements concerning Spill Act claims and to otherwise ensure that municipal officials receive notice of remediation events. In 2006, the Legislature also instructed DEP to adopt rules which require “any person who is responsible for conducting a remediation of a contaminated site to provide written notification to any local property owners and tenants who reside within 200 feet of the contaminated site.”

On September 2, DEP finally responded to this Legislative mandate by adopting a comprehensive new rule governing community notification dur-

ing site remediation. This rule, which is part of the Technical Requirements for Site Remediation, requires extensive and repeated written notices to neighbors, bilingual signs and fact sheets as well as reporting to local officials. All of these activities must be supervised by, and coordinated with, DEP. In certain situations the rule goes well beyond mere notification. When it appears to DEP that there is public interest in the remediation, DEP has adopted a protocol which sets the stage for expanded community notification.

Although the rule takes effect immediately, notification for projects which are presently on-going need not be completed until September, 2009. Nevertheless, all clean-up projects need to complete a newly mandated sensitive population analysis; however, ongoing remediation projects can postpone mailing letters or posting signs until next year. All projects also need to determine if a language other than English is predominantly spoken by neighboring property owners or tenants. It is unclear how responsible parties are to determine the predominant language for such discrete areas.

DEP’s newly adopted rule governs “notification of remediation of contaminated sites and public outreach” and basically requires that responsible parties

(1) identify “sensitive” populations using a mandatory checklist, and (2) provide public notice of on-site contamination by either (a) issuing periodic notification letters, or (b) posting a conspicuous sign.

Residences, drinking water wells, schools, day care centers, parks and neighborhoods seeking Environmental Justice designation are all presumed to be “sensitive populations.” The sensitive population assessment must be conducted using a DEP checklist. The completed assessment must be submitted to NJDEP at least two weeks prior to any field activities — such as drilling test wells or collecting soil samples. It is noteworthy that the presence or absence of sensitive populations does little to change to responsible party’s primary notification obligations.

The public notification requirements are triggered by the remedial investigation phase of a clean-up project. Preliminary assessments of site conditions and site investigation activities do not require public notice. The rule fails to precisely define the events during the remedial investigation phase of the project that trigger notice. The critical — albeit undefined — term is “field activities.” In some cases it is apparent that events are “field activities” — excavation of contaminated soil by workers in protective suits is likely to arouse public interest and constitutes “field activity.” However, the answer is less clear if the work involves routine property surveying in advance of clean-up or biologists sitting in their cars and counting local wildlife populations as part of an ecological risk assessment. Further guidance from DEP may be required on

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some of these issues.

The statute is limited to parties who reside within 200 feet of the contaminated site. Nevertheless, DEP's rule is directed at all property owners and tenants (commercial as well as residential), and administrators of schools or day care facilities, within 200 feet of the boundary of the contaminated site. All of these neighbors must receive notice prior to field activities. Notice can take the form of letters or signs. The rule establishes seven mandatory items to be included in each notification letter.

If the responsible party elects to use a sign to provide notice, the rule specifies the minimum size and much of the required language. Signs must provide further contact information and direct the public to DEP's Web site. Signage must remain in place until a final No Further Action letter is issued. The option to use signs may appeal to parties responsible for performing the clean-up. However, property owners, local officials and neighbors probably will not be happy to see signs which are at least two feet by three feet in size printed in a font size sufficient to be readable from the street or sidewalk. Environmental lawyers may soon find themselves scrambling to ensure that the signs mandated by DEP conform to local ordinances and that required sign permits can be obtained within the time limits permitted by DEP's rule.

Notices and signs must be in English. However, when non-English-speaking people predominate within 200 feet of the site boundary, then notification must proceed using the non-English language(s) used by these populations.

Once contamination moves off site, the notification procedures get more complex. Parties responsible for remediating contamination which has migrated off-site must satisfy additional requirements, including at a minimum: (1) preparation and distribution of a project fact sheet; (2) establishing a listing of "on-line resources" for information about the contaminants; and (3) publication of the fact sheet as "a display advertisement" (not legal notice) in a local newspaper.

The deadlines in the proposed rule are very aggressive. Notice of field investigation activities must be given two weeks in advance of each phase of the investigation. Notice letters must be sent every two years after the initiation of the remediation until a No Further Action letter is issued. If contamination is identified and has migrated off-site the mandatory fact sheets must be mailed out within four weeks. The required fact sheet must be published in a local daily or weekly newspaper as display advertising (not mere legal notice) and must be updated by mailing and renewed publication once the extent of off-site impact has been determined.

All public notification activities must be coordinated with the appropriate DEP case manager, as well as DEP's Office of Community Relations. Local officials must receive copies of almost everything.

Subsection O of the rule contains what are arguably the most troubling, and are certainly the most far-reaching, requirements. Under subsection O a petition signed by 25 or more neighbors or people who work within 200 feet of the site (or the off-site contamination), or any single municipal official, triggers additional public outreach which can include (1) public meeting(s); (2) additional publication; and (3) establishment of a local site information repository.

The rule provides very little guidance concerning how DEP will decide which sites warrant enhanced outreach. Furthermore, once DEP elects to require an enhanced program, there are no limits on the type, number and frequency of the communications. The language of DEP's rule, as well as recent guidance documents, strongly suggest that the agency favors a public hearing process similar to National Contingency Plan procedures used by EPA for public participation at Superfund National Priority List sites. The Federal regulations require, among other things, that EPA (or the lead agency), after properly providing public notice of a proposed remedial plan and making the plan publicly available for review, "[p]rovide a reasonable opportunity, not less than 30

calendar days, for submission of written and oral comments on the proposed plan and the supporting analysis and information located in the information repository."

The new rule does leave several questions unanswered. Responsible parties with questions about how the rule applies to long-term operation and maintenance activities or the possibility of using an alternative program to address the public notification requirements may need to consult with DEP's Office of Community Relations. Responsible parties who are performing clean-up subject to oversight from federal agencies may find themselves subject to competing or conflicting community relations requirements. Moreover, the cumbersome provisions about effective dates of the new rule are certain to raise questions.

To appreciate the scope of this new public notification program, it should be remembered that the May 2006 version of DEP's Known Contaminated Sites lists 14,079 properties. Most of these properties — any many others — have the potential to be impacted by this new rule. Indeed, only clean-ups involving residential underground oil tanks and emergency response actions are exempt from the notice requirements. When the number of properties within 200 feet of these locations, plus off-site locations impacted by contamination, is included, a staggering number of properties in New Jersey are implicated by this far-reaching new rule. Once the rule takes full effect it is not difficult to imagine walking down a street in a urban area in New Jersey and seeing entire blocks where there are signs on every lot announcing remediation; bilingual letters in every mailbox and pages of display ads announcing remedial activities in all the local papers. Responsible parties performing clean-ups in New Jersey must pay careful attention to DEP's requirements concerning public notification and start to anticipate both the need for community outreach and the friction with landowners, local officials and other third parties that these rules are certain to create. ■